

O'TOOLE SCRIVO

A LIMITED LIABILITY COMPANY

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Via ECF

Honorable Brian R. Martinotti, U.S.D.J.
United States District Judge
U.S. Post Office & Courthouse
2 Federal Square
Newark, NJ 07101

Re: *In re Insulin Pricing Litigation*, No. 2:23-md-03080-BRM-RLS (D.N.J.)
Supplemental Authority Regarding Pending Motions to Dismiss

Dear Judge Martinotti:

The PBM Defendants notify the Court of a recent opinion dismissing a rebates-related lawsuit brought by the State of Hawai'i, *Hawai'i, ex. rel. Lopez v. CaremarkPCS Health, L.L.C.*, 2024 WL 4625719 (D. Haw. Oct. 30, 2024). The dismissed Complaint in *Hawai'i* includes many of the same factual allegations alleged in this MDL, and was brought under Hawai'i's consumer protection law, which is modeled after the Federal Trade Commission Act. *See* Haw. Rev. Stat. Ann. § 480-2(b).

The opinion (Exhibit A) supports many of the arguments the PBM Defendants made in their motions to dismiss (ECF 190, 250) the consumer-protection claims of Montana, Illinois, and three counties—all brought under laws that also are modeled after the FTC Act. As relevant here, the District of Hawaii ruled:

- The deception claims and unfairness claims based on allegations of fraud failed to meet the heightened pleading standards of Federal Rule of Civil Procedure 9(b) (*5, *7);
- The PBM Defendants' alleged statements to third-party payer clients could not support a deception claim because PBM representations to those third-party payers are not material to *consumers* (*5);
- The State failed to identify a specific public policy that was allegedly violated by the PBM Defendants to support its unfair acts or practices claim (*8–9);
- The PBM Defendants' alleged rebate and formulary placement strategies “do not rise to the level of the type of” unfair conduct found to be “immoral, unethical, oppressive, or unscrupulous” (*9); and

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- The alleged injuries to consumers were speculative and did not support an unfair acts or practices claim (*10).

Plaintiffs' claims in this litigation fail for the same (and additional) reasons the State's claims fail in *Hawai'i*. See ECF 190, 250.

Respectfully submitted,

/s/ *Thomas P. Scrivo*

Thomas P. Scrivo, Esq.

Cc: All counsel of record (*via* ECF)